

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HILLARY WALLS-STEWART,

Plaintiff,

v.

G. STEVEN HAMMOND, DAN  
PACHOLKE, ERIN LYSTAD, SARA  
SMITH, RICHARD MORGAN,  
JOHN/JANE DOE,

Defendants.

CASE NO. 3:16-CV-05584-BHS-DWC

REPORT AND RECOMMENDATION

Noting Date: November 4, 2016

The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. Presently before the Court is Plaintiff's "Motion for an Order Dismissing Only Margaret Gilbert as a Defendant Only" ("Motion"). Dkt. 27. The undersigned recommends Defendant Gilbert be dismissed pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

**BACKGROUND**

On July 26, 2016, this Court directed service of Plaintiff's Complaint. Dkt. 7. Defendant Margaret Gilbert returned a signed waiver of service on August 19, 2016. Dkt. 14. Plaintiff then

1 filed an Amended Complaint, which replaced the original Complaint, on August 25, 2016.

2 Defendants filed their Answer on September 13, 2016. Dkt. 34.

3 Plaintiff filed the Motion on September 14, 2016, prior to Defendants filing their Answer.  
4 *See* Dkt. 27, 34. Defendants filed a Response to the Motion stating they do not oppose Plaintiff's  
5 request to dismiss Defendant Gilbert. Dkt. 31.

### 6 DISCUSSION

7 Federal Rule of Civil Procedure 41 sets forth the circumstances under which an action  
8 may be dismissed. Under Rule 41(a)(1), an action may be voluntarily dismissed without  
9 prejudice by the plaintiff if the plaintiff files a notice of dismissal before the defendant files an  
10 answer or summary judgment motion and the plaintiff has not previously dismissed an action  
11 "based on or including the same claim." Fed.R.Civ.P. 41(a)(1); *Wilson v. City of San Jose*, 111  
12 F.3d 688, 692 (9th Cir. 1997). Once the defendant has responded to the complaint, the action  
13 may only be dismissed by stipulation of dismissal signed by all parties who have appeared or "by  
14 court order, on terms that the court considers proper." Fed.R.Civ.P. 41(a)(1), (2).

15 Plaintiff requested the dismissal prior to any defendant filing an answer or summary  
16 judgment motion. *See* Dkt. 27, 34. The Court also finds Plaintiff has not previously dismissed an  
17 action based on the same claim. Therefore, Plaintiff's Motion (Dkt. 27) should be granted  
18 pursuant to Rule 41(a)(1).

### 19 CONCLUSION

20 For the foregoing reasons, the Court recommends Defendant Gilbert be dismissed  
21 without prejudice from this action.

22 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
23 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.

1 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*  
2 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
3 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on  
4 November 4, 2016, as noted in the caption.

5 Dated this 18th day of October, 2016.

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8 David W. Christel  
9 United States Magistrate Judge  
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